

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
FCC Reduces Backlog of Broadcast Indecency)	GN Docket No. 13-86
Complaints by 70% (More Than One Million Complaints);)	
Seeks Comment on Adopting Egregious Cases Policy)	
)	

REPLY COMMENTS OF THE PARENTS TELEVISION COUNCIL

The Parents Television Council, representing more than 1.3 million Americans dedicated to protecting children from sex, violence and profanity in entertainment, hereby submits the following reply comments in the above proceeding.

The recently concluded initial comment period in this proceeding yielded a nearly unprecedented outpouring of concern from the American people. Not only have greater than 102,000 comments been filed, they run better than 1000-to-1 against the FCC implementing any change that would relax the Commission's broadcast decency rules. This staggering number is clear evidence of the public's deep and abiding concern about media content generally, and the use of the public airwaves specifically.

As the Commission sorts through these tens of thousands of comments, we are compelled to reiterate what we set forth in our initial comment, primarily that no court has compelled the FCC to make any changes to its indecency rules and doing so now will continue to cloud the issue and invites further litigation from broadcasters. While some commenters

seek to relitigate both the *FCC v Pacifica* and *Fox v FCC* decisions, others blatantly misrepresent the holdings of those cases.

1. DESPITE INDUSTRY “POOR-MOUTHING,” BROADCASTING REMAINS UNIQUE IN ITS PERVASIVENESS AND INFLUENCE

It its comments, NBC Universal Media, LLC makes a confounding and seemingly self-deprecating claim about the decline of the broadcast industry, specifically that “Americans today, including children, spend more time engaged with non-broadcast channels delivered by cable and satellite television, the Internet, video games and other media than they do with broadcast media.”¹

While no one would argue that there has not been a substantial increase in the amount of media content available as well as new ways for people to consume it, NBC Universal’s description of its own television network on its website seems to run contrary to its pleading of marketplace poverty:

NBC Television Network

The NBC Television Network’s strength derives from combining NBC’s strong national identity and programming with the local identity and programming of its affiliates in communities across America. The sale of advertising time enables the NBC Television Network to provide programming to the public free of charge.

Affiliated television stations are an integral part of NBC’s overall broadcast service. The NBC Television Network broadcasts approximately 5,000 hours of TV programming each year, transmitting to more than 200 affiliated stations across the United States. These independently owned affiliates then broadcast the NBC signal to an estimated 99 percent of all homes in the United States with television sets. In addition to airing NBC’s national programming, affiliates serve their communities by producing news, sports, and public affairs programming that addresses local needs.²

¹ Comments of NBC Universal Media, LLC p. 2

² “This is NBCUniversal” <http://www.nbcuni.com/corporate/about-us/>

The National Association of Broadcasters continued a similarly self-serving, but self-deprecating argument when it said “the ways that Americans obtain and use media content has changed in the past 35 years.... but with particular regard to the government’s concern that children may be exposed to adult-oriented or otherwise inappropriate material, it is not possible to make a principled argument that broadcasting is either the most likely or most easily available means of exposure.”³

However, as a trade association, the NAB has spent much of its time in Washington trumpeting the unique accessibility of broadcast programming as well as a marked increase in the number of over-the-air only households. In fact, in 2012, the NAB heralded a new study which found that:

- 1) The number of Americans now relying on over-the-air (OTA) television reception increased to almost 54 million, up from 46 million just a year ago
- 2) 17.8% of all U.S. households with TVs use over-the-air signals to watch TV programming; this compares with 15.0% of homes reported as broadcast-only last year
- 3) Some minority groups are more dependent on broadcast reception than the general population, including 28% of Asian households (up from 25% in 2011) and 23% of African-American households (up from 17% in 2011). In addition, 26% of Latino homes (23% in 2011) are broadcast-only, a proportion that increases to 33% among homes in which Spanish is the language of choice, up from 27% in 2011. In all, minorities make up 44% of all broadcast-only homes, a four-point increase from 2011, when 40% of broadcast-only homes were minorities
- 4) Homes headed by younger adults are also more likely to access TV programming exclusively through broadcast signals
- 5) Lower-income households also trend towards broadcast-only television, with 26% of homes with an annual income under \$30,000 receiving TV signals solely over-the-air⁴

The inescapable conclusion derived from the National Association of Broadcasters own data is that even in an environment of media proliferation, millions of Americans still rely

³ Comments of the National Association of Broadcasters p. 2

⁴ NAB News Release: “Over-the-air TV Viewership Soars to 54 Million Americans” June 18, 2012
<http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761>

exclusively on over-the-air broadcasting. Those populations tend to skew younger, have lower income, and be made up of more minority groups than the population as a whole.

In other words, any would-be changes to the Commission's broadcast indecency rules would disproportionately affect the poor and minority groups. Therefore, it would be ill-advised for the Commission to embark on a path that would certainly expose more poor and minority children to indecent programming who, through no fault of their own, rely on the publicly-held resource known as the airwaves.

As to the counterfactual argument that broadcast television is somehow no longer a ubiquitous presence in American households, the television penetration rate in 1975, around the time of the *Pacifica* case, was 97.1%. In 2011, that number stood at 98.9%.⁵

And just this week at the Television Critics Association tour, Fox Entertainment chairman Kevin Reilly promoted his broadcast network's viability in this way:

"On several different occasions during the 45-minute session, Reilly urged those writing about the business to have perspective, particularly as it relates to broadcast vs. cable. His message: not only is basic cable still largely propped up by network acquisitions (and feature films), but also the ratings that qualify a series as a "hit" on cable often warrants cancelation on a broadcast network like Fox. *To drive home his point, Reilly shared a stat he had employed months earlier at Fox's upfront presentation: of the 1,050 original series on basic cable, only four rank within the top 50.*"⁶

There is no doubt that broadcasting – largely because of its uniquely accessible nature, granted by its use of the public airwaves – remains a leading influence in American culture, and we urge the Commission to recognize fully this reality.

⁵ Television Bureau of Advertising. "TV Basics: A Report on the Growth and Scope of Television" http://www.tvb.org/media/file/TV_Basics.pdf p.2

⁶ Fox's Kevin Reilly on Netflix 'Mystery Audience,' 'Dads' Controversy, 'Idol' Future. The Hollywood Reporter, 8/1/2013: <http://www.hollywoodreporter.com/live-feed/foxs-kevin-reilly-netflix-mystery-598025>

2. SOME BROADCAST NETWORKS ARE PLAYING A SHELL GAME WITH CONTENT

In its comments, the Fox network “urges the Commission to conclude that it is legally required, and logically bound, to cease attempting to enforce broadcast indecency limits once and for all.”⁷ From where does Fox derive such a misleading, false and outrageous demand? It is certainly not from the ruling of the Supreme Court in *Fox v FCC*. In that case the Court threw out several previous indecency enforcement actions on procedural grounds, but those are not at issue before the Commission in this proceeding. More significantly, the Court left both the Commission’s indecency rules as well as the underpinning statute in place while in a related case, Chief Justice Roberts made clear the networks were “on notice” for continued violations of the law as we cited in our initial comments in this proceeding. It is Fox, not the Commission or the American people, who have misinterpreted the result of the *Fox II* case.

Fox also continues its shop-worn complaints about a “chilling effect” on speech due to the mere presence of broadcast decency law.⁸ We are compelled to ask how Fox’s speech was “chilled” when it aired an episode of “American Dad” in April, 2013, that included sexual references to “holes that need exploring,” and “put a finger in the stink?”⁹ How was Fox’s speech “chilled” during a May, 2010, episode of “Family Guy” that depicted one character eating excrement out of a diaper, then eating vomit, and finally licking the remaining excrement from a baby’s bottom – while the baby expresses physical gratification from having his bottom licked?¹⁰

⁷ Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. p. 1.

⁸ Id at p. 39

⁹ Explicit Sex-Kink Episode of Fox’s “American Dad” Violates Broadcast Decency Law, Says PTC
<http://w2.parentstv.org/Main/News/Detail.aspx?docID=2792#sthash.vyg2yXX9.dpuf>

¹⁰ PTC Calls on FCC to Find Fox’s 150th “Family Guy” Episode Indecent
<http://www.parentstv.org/PTC/news/release/2010/0504.asp>

There is also more recent evidence that Fox is actively working to push content that is at least offensive, and perhaps legally indecent, into prime time and outside the safe harbor times established in *Pacifica*. On Saturday, July 27, 2013 – more than a month after Fox’s scurrilous claims of “chilled speech” asserted in its initial comments – the network premiered “ADHD: Animation Domination High-Def.” Broadcast during this program was the following:

High School USA – Explicit dialogue included this twisted scene with a teenage girl speaking excitedly to her mother about “sexting”:

- *Amber: Brent's about to send me a picture of his penis, Mom.*
- *Mom: Awesome. Man, it's really cool that you can just send stuff like that by phone nowadays.*
- *Amber: It's so easy, right.*
- *Mom: So easy.... when I was a teenager your Dad had to email me a huge attachment of a scan of his dick and by the time it downloaded I was like whatever just get over here and whip it out already.*

(Referencing sexting among classmates)

- *Marsh: Easy. We'll all take pictures of our dicks and then we'll send them to every girl in school.*
- *Blackstein: But, Marsh, mine's ugly.*
- *Marsh: So it is Brent. So is mine. So is John's little stubby stupid one and Ari's hook nosed one. And this guy's weird camel-toed penis. And Bighole's and Veiny's and, I don't even know what to call that. I mean, if dicks weren't ugly, they'd call them tits.*
- *A new angle of the crowd of boys is shown. The bare buttocks of seven boys are all or partially visible in the shot.*

To be clear, this material originally aired within the safe harbor for indecent content and is thus exempt from the Commission’s indecency rules. However, Fox Entertainment chairman, Kevin Reilly, told *Daily Variety*: “I’d like to find the next *Family Guy* out of this block.” Clearly, Fox has expressed every intention of exporting similar content to the times of day we know millions of children to be in the audience.

Any reasonable assessment must conclude that Fox’s speech, as well as that of any other broadcaster, is not chilled by the Commission’s broadcast decency rules. In fact, broadcasters are perfectly free to air unlimited indecent material at the times of day when children are much less likely to be in the audience, defined by the courts as the hours between 10:00PM and 6:00AM. The

Commission's years-long inaction in enforcement of broadcast decency law only serves to invite even more content like that cited here.

Fox further objects to the American people filing indecency complaints with the Commission while falsely characterizing web-filed indecency complaints as "automated."¹¹ Every single broadcast indecency complaint, no matter the method of submission, comes from the affirmative action and efforts of an individual American citizen who enjoys full ownership of the broadcast airwaves and thus has a right to a say in how they are used. Fox's claim of "automation" is absurd on its face and insulting to the millions of Americans who freely exercise their First Amendment rights to petition the government in such a way.

3. SOME COMMENTERS FALSELY ASSERT THE SUPREME COURT HAS THROWN OUT INDECENCY LAW AND/OR THE COMMISSION'S RULES

In addition to Fox's mischaracterization of the *Fox II* decision, the joint comments filed by TechFreedom, Public Knowledge, Electronic Frontier Foundation and Center for Democracy and Technology asserted that "in *Fox v. FCC*, the Supreme Court struck down the FCC's confused and inconsistent regulations in this area as unconstitutionally vague and procedurally flawed."¹²

These are all well respected groups, known for their in-depth analysis of key technology policy issues. In fact, the Parents Television Council has worked with many of them on issues of key concern, so it is disturbing and unsettling that they would misrepresent *Fox II* in such a way. The Commission must take into account such blatant falsehoods claimed in this proceeding

¹¹ Id

¹² Comments p. 1

when examining the record. It is clear that some in the industry and among certain interest groups wish to influence the Commission into thinking that the result of *Fox II* is something different from what it actually was.

4. CONCLUSION

It is our hope and expectation that the Commission will not confuse what the entertainment industry and its allied groups *want* to be the case with what the Supreme Court *actually did* (or, more precisely, did not do) in *Fox II*. The broadcast decency law, 18 USC § 1464, remains in force, and no court has overturned it or the Commission's rules to implement it. The most recent Congressional action was to increase ten-fold the fining authority of the Commission to deal with violations of the law. The public policy on this matter is clear.

Furthermore, the Commission asked for "public comment" in this proceeding, and there is no ambiguity in what the record reflects that the public wants – clear, consistent, vigorous enforcement of federal broadcast decency law. Either the Commission will heed the voice of the American people on this issue, or it will side with the corporations it regulates rather than the public interest it was created to promote.

As a result, there is nothing in the record presented in this proceeding that dissuades us from the recommendations we made to the Commission in our initial comments:

- 1) Since no court has compelled the Commission to change its indecency rules, there is no reason to do so. Doing so now, in the wake of the Supreme Court refusing to obviate the law on two separate occasions would lack clarity as well as invite the possibility of further litigation.

- 2) Should the Commission wish to administer fines based on the “egregiousness” or intensity of indecent material, it is free to do so. However, this does not mean that other violations of the law should escape attention from the Commission. In practice, a more “egregious” violation could be subject to a larger fine.
- 3) The Commission must deal with the backlog of several hundred thousand indecency complaints in as expeditious manner as possible. The “staleness” of the complaints already dismissed by the Enforcement Bureau was due only to the Commission’s own inaction, and constituted no fault on behalf of the filer.
- 4) Further agency action on broadcast decency enforcement should rightfully be administered at the Commission level and not within the relatively unaccountable agency bureaus.

Respectfully submitted,

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